Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
100 Church Street
New York, N.Y. 10007
212-566-4338 (or 4375)

L. KEVIN SHERIDAN,
MORRIS EINHORN,
of Counsel.

May 22, 1980

TABLE OF CONTENTS

	Page
Preliminary Statement	1
a. Delaware baselessly assumes that riparians in downstream States have property rights in the flow equitably apportioned New York of its own waters	2
b. Interstate agreements are not jeopardized by the Court of Appeals' decision	6
Conclusion	14

CASES CITED

Colorado v. Kansas, 320 U.S. 383 (1944)	5, 10
Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933)	3
Hinderlider v. La Plata Co., 304 U.S. 92 (1938)	4-5
Nebraska v. Wyoming, 295 U.S. 40 (1954)	5, 7
New Jersey v. New York, 283 U.S. 336 (1931)	10

CASES CITED

	Page
New Jersey v. New York, 347 U.S. 995 (1954)	6
Pine v. City of N.Y., 185 U.S. 93 (1902)	3
Shively v. Bowlby, 152 U.S. 1 (1894)	7
U.S. v. Gerlach Live Stock Co., 330 U.S. 725 (1950	3

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF OPPOSING
PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This supplemental brief is necessitated by the fact that subsequent to submission of its brief opposing the instant petition, the City of New York (City) was served with an amicus brief for the State of Delaware by counsel simultaneously representing Hackensack Water Company as amicus. As we will show, Delaware's concern over the uncompensated "taking" of its riparians' rights to the flow of New York tributaries as apportioned that State by this Court is both baseless and diversionary - as is its contention that participation in management of the Delaware River Basin "has been prejudiced by the decision below" (Del. br., pp. 3, 4).

a. Delaware baselessly assumes that riparians in downstream States have property rights in the flow of New York's waters equitably apportioned that State.

In urging that certiorari be granted, Delaware asserts that the Court of Appeals' decision is the first to bar "recovery for compensatory damages against the upstream taker"; "conflicts with prior decisions of

this Court"; and that it imputes "a legal consequence to the decree not previously recognized" (Amicus br., pp. 5, 8, 10).

Significantly, although the doctrine of equitable apportionment was formulated at the turn of the century, and has been applied on numerous occasions to State conflicts over interstate streams, none of the petitioners nor the amici herein has been able to find or cite a single case wherein damages were awarded any water claimant in one State for the share of the flow apportioned another State by this Court.* Delaware never-

*Harrisonville v. Dickey Clay Co., 289 U.S. 334 (1933), cited by Delaware (br., p. 6) involved California's intrastate waters, as fully detailed in U.S. v. Gerlach Live Stock Co., 330 U.S. 725, 728-9 (1950). And no equitable apportionment of interstate waters was involved in Pine v. City of N.Y., 185 U.S. 93 (1902), similarly cited by Delaware (br. p. 6). See City's Main Br., p. 38.

theless insists that the Court of Appeals "extended the principle of Hinderlider to deny riparian owners the remedy of compensatory damages" for "infringement on riparian rights" (Amicus br., pp. 5, 6). It simply overlooks the fact that this Court there flatly rejected the contention that a Colorado water claimant's "vested property right" in the flow of an interstate stream was unaffected by an equitable apportionment thereof between two sovereign States "except by a condemnation proceeding and payment of compensation" (304 U.S. at p. 102; see 25 P. 2d at 191).

As was there made clear, since Colorado "possessed the right only to an equitable share of the water in the stream," an equitable apportionment of that stream's flow to another State "can

not have taken" from Colorado's water users any vested rights therein since they had none (304 U.S. at p. 108). The rights of Delaware riparians to the flow of New York's tributaries "can rise no higher" than those of Delaware. Nebraska v. Wyoming, 295 U.S. 40, 43 (1935). "The lower State is not entitled to have the stream flow as it would in nature regardless of need or use." Colorado v. Kansas, 320 U.S. 383, 393 (1944).

In short, far from being the first decision to bar private recovery for the flow apportioned another State by this Court, or conflicting with "prior decisions of this Court," there has been no such recovery in the 80 years since the equitable apportionment rule was first adopted. All prior decisions of this Court make it plain that a State appor-

tioned an equitable share of its own waters is not required to take, seize or condemn them from any other State or its citizens. Hence, Delaware's complaint that the Court of Appeals "has imputed a legal consequence to the decree not previously recognized," must be taken with the proverbial grain of salt - even ignoring the costly terms, "conditions and obligations" imposed upon New York to provide the downstream States with Spring-flood control, a water purification plant and a compensating flow several times the natural flow of the "summer river" (347 U.S. 995, 996-7 [1954]), of which Delaware was scarcely oblivious.*

*In acceding to the 1954 consent decree (347 U.S. 995), Delaware's brief to this Court stated (p. 16) - "it is admitted that at this time Delaware is unable to show damage by reason of greater diversions of the City of New York accompanied by substantially greater releases." The fact is that not a single Delaware riparian has ever claimed damages from the (Cont'd)

Interstate agreements are not jeopardized by the Court of Appeals' decision, as is baselessly contended.

(1)

Delaware cautions that unless certiorari is granted, the decision of the Court of Appeals denying "compensatory damages against the upstream taker," will likely result in "a diminished state interest in negotiating water agreements" (Amicus br., p. 8). It is thus said that the decision "encum-

---

city in the 25 years since its first diversions in 1955 from the East Branch (Pepacton) and Neversink River (Neversink), or in the 15 years since its first diversion in 1965 from the West Branch (Cannonsville). While it is basic that the rights of Delaware's riparians to the flow of New York's tributaries "can rise no higher" than those of Delaware (Nebraska v. Wyoming, supra), we note Delaware's failure to cite a single decision of its Courts recognizing any riparian right to compensation for a diminished flow, even of that State's share of interstate waters, when required for public use. See, Shively v. Bowlby, 152 U.S. 1, 23 (1894).

bers the management of interstate waters by attaching a penalty to a state's participation in any interstate equitable apportionment" - that penalty being "forfeiture" of the "right" of its riparians to compensation from the "upstream taker," and possible State "liability for the diminution of its downstream private riparians' rights" (Amicus br., p. 3).

We put aside the fact that the downstream States in the Delaware Basin "participated" in the equitable apportionment herein after decades of fruitless negotiations had led to a unilaterally planned diversion by the upstream State (New York), an injunction proceeding by New Jersey, and this Court's resolution of the conflict by an equitable apportionment to New York of a share of its own tributaries to the Delaware - on terms and conditions

consented to by the downstream States as fully protective of their rights to the benefits of the river (City's br., pp. 3-9; City's App., pp. 1-23). Delaware's in terrorem arguments as to the adverse effect of the Court of Appeals' decision upon future participation by downstream States in equitable apportionments are plainly grounded on that State's continued adherence to the proposition, repeatedly repudiated by this Court, that the lower State is entitled to the full and undiminished natural flow of the river - "the lower State is not entitled to have the stream flow as it would in nature" (Colorado v. Kansas, 320 U.S. 383, 385, 393 [1943]), or to "come down to it undiminished" (New Jersey v. New York, 283 U.S. 336, 343 [1931]).

Delaware, consequently, fails to recognize that the decision it complains of denies damages "against the upstream taker" because an upstream State equitably apportioned a share of the flow from its own tributaries by this Court - on heavy terms and conditions compensatory to the downstream States - has no occasion to "take" the flow thus apportioned it, each downstream State and its citizens having no right to more than an equitable share of the flow of an interstate stream. There is, consequently, no "forfeiture" of any "right" by citizens of a downstream State to the full natural flow of the river or to the upstream State's apportioned share thereof from its own tributaries, and no liability on the part either of the "up-

stream taker" or the downstream State to compensate any such non-existent "right."*

(2)

Turning from the general to the specific, Delaware next urges that since it has joined with the City and all parties to this Court's amended decree of 1954 in "a reappraisal of the Decree" - its "negotiating position has been prejudiced by the decision below" (Amicus br., p. 4). As we have previously pointed out, Congressional action in placing the "middle Delaware" in the National Wild and Scenic Rivers system has effectively shelved the Tocks Island project relied on by Pennsylvania and New Jersey to provide reservoir capacity for 756 mgd of Delaware River water for their joint use (City's App., pp. 26-27, 15-16, 22). Stating that negotiations are now in progress "to reexamine the decree in light of changed circumstances," Delaware asserts that the Court of Appeals' decision "poses questions about the State of Delaware's continued participation in these negotiations," because its "negotiating position has been prejudiced by the decision below" (Amicus br., pp. 4, 9).

Stripped of diplomatic niceties, Delaware's position boils down to this - since the City's huge reservoirs and

*Equally vacuous is Delaware's argument that the Court of Appeals' decision "would compel downstream riparians to seek recovery against their own sovereign" for an "inverse condemnation" based on that sovereign's participation in an equitable apportionment of interstate waters (Amicus br., pp. 7, 8). Apart from the fact that a riparian's rights in interstate waters rise no higher than those of its sovereign, which is only entitled to an equitable share thereof, this Court has made it abundantly clear that no such collateral attack on the policy of a State appearing before this Court in a dispute between States, can be tolerated. See cases cited, City's Main br., pp. 21, 26-27.

releases therefrom provide, presently and in the foreseeable future, the only major storage capacity for the lower States, the City will be far more manageable if liability to thousands of their riparians were held over its head as a sword of Damocles. Thus, the decision below "prejudices" Delaware's negotiating position and poses questions concerning its "continued participation in these negotiations." We prefer to attribute this blackmailing posture to the priority accorded the narrower interests of amicus Hackensack Water Co. by counsel simultaneously representing Delaware, rather than to that State itself.

In urging that the decision below "would disrupt the federal policy of encouraging interstate apportionment to resolve disputes among the states," ,

the amicus brief fails to recognize that no such policy can succeed by trampling over the rights of an upstream State to an equitable share of its own waters, or by inviting this Court to reverse sound and firmly established principles so as to require that State to "take" such share from lower State riparians who have no rights thereto.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: May 22, 1980

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Respondent.

L. KEVIN SHERIDAN,
MORRIS EINHORN,
of Counsel.